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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/636,069	08/06/2003	James Carl Schmidt	66192-0009	9856
10291	7590	02/22/2006	EXAMINER	
RADER, FISHMAN & GRAUER PLLC 39533 WOODWARD AVENUE SUITE 140 BLOOMFIELD HILLS, MI 48304-0610			WEIER, ANTHONY J	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 02/22/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/636,069

Applicant(s)

SCHMIDT, JAMES CARL

Examiner

Anthony Weier

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 17 November 2005 and 29 November 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-38 and 40-42 is/are pending in the application.
- 4a) Of the above claim(s) 15-38 and 40-42 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Election/Restrictions***

1. This application contains claims 15-38 and 40-42 drawn to an invention nonelected with traverse in the paper filed 4/4/05. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

### ***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1-14 and 40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marsland taken together with Applicant's own admission or Marsland taken together with the "Leavening" website article and either one of Arciszewski et al and RecipeSource.

The claims stand rejected for the reasons set forth in the last Office Action (mailed 6/17/05) and including the following.

The claims now further recite that said wafers are wafer cookies that are "light and airy." Applicant admits that wafers by definition are "typically light and airy foods" (paragraph 28). Since Marsland is silent regarding how the wafer therein is prepared and whether or not same includes a leavening agent, it is expected that the wafer contemplated by Marsland would possess a light and airy characteristic as typically

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known. In other words, Applicant's admission gives evidence that the wafer would inherently possess such attributes. Nevertheless, if it is shown that this cannot be the case and that the Marsland wafer must be of a thin hard, atypical type, the following should be noted. It is well known to add leavening agents to dough sources used to create baked goods wherein said leavening agent acts to incorporate air therein and thus provide a lighter and airier baked product as taught, for example, by the "Leavening" website article. Moreover, it is conventional to employ leavening agents in dough products used to create wafers as taught, for example, by Arciszewski et al (col. 13) or in the RecipeSource recipe. It would have been obvious to one having ordinary skill in the art at the time of the invention to have prepared said wafer of Marsland in such typical manner in view of the "Leavening" article and Arciszewski et al or the RecipeSource recipe as a matter of preference as to what is conventionally employed in preparing edible wafer products.

#### ***Response to Arguments***

4. Applicant's arguments filed 11/17/05 have been fully considered but they are not persuasive. With the arguments largely centered on same, the Schmidt Declaration has been carefully considered but is not persuasive. In particular, it should be noted that the example employed in the comparison (Example 13 in Marsland) pertains to a cookie. Wafers are a type of cookie, so the comparison would have been reasonable. However, Applicant has now amended the wafer to be a particular type of wafer that is airy and light. It would appear this was not the intent of the cookie set forth in Example 13, particularly since a leavening ingredient was not incorporated therein.

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Nevertheless, the rejection above has been modified to address such new limitation, and it should be noted that the comparison no longer applies. Though referring to dough to be used in producing a wafer product, Marsland does not disclose an example of preparing a wafer and, specifically, one that is light and airy. As recited by Applicant, the conventional notion of wafers is that same are light and airy. Therefore, it would be expected that the wafer referred to in Marsland would be light and airy. It should be further noted that Marsland does not teach away from products that are given a lighter and airy characteristic. Although pertaining to the preparation of a bar (which is similar to a wafer in content and, other than thickness, shape), Marsland employs a leavening agent (Example 10). In any event, if, as described above, it is established that the Marsland wafer was not intended to be or could not be light and airy as called for in the instant claims, secondary references have been applied to teach such known concept.

### ***Conclusion***

5. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

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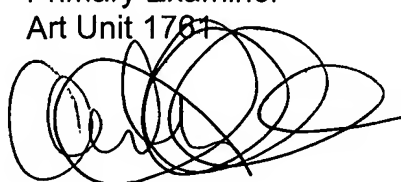
extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 571-272-1409. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Anthony Weier  
Primary Examiner  
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Anthony Weier

February 17, 2005